United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL WITH PROOF OF SERVICE

77-6008

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

P/S

In the Matter of the Return of
Illegally Seized Property of:

STREETWORKERS, INC.

STREETWORKERS, INC.,

Petitioner-Appellant,

UNITED STATES OF AMERICA,

Respondent-Appellee.

UNITED STATES COURT OF APPEALS
FILED
APR 1 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PETITIONER-APPELLANT

DELSON & GORDON
Attorneys for Petitioner-Appellant Streetworkers, Inc.
230 Park Avenue
New York, New York 10017

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • PE 6-8469

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	
POINT I -- THE DISTRICT COURT'S ORDER DENYING STREETWORKERS' MOTION FOR THE RETURN OF ITS BOOKS AND RECORDS IS APPEALABLE	1
POINT II -- THE GOVERNMENT HAS ADVANCED NO VALID REASON FOR HAVING OBTAINED STREETWORKERS' BOOKS AND RECORDS DIRECTLY FROM THE CITY OF NEW YORK DEPARTMENT OF INVESTIGATION RATHER THAN LAWFULLY SUBPOENAEING THEM FROM STREETWORKERS	5
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page
Gullett v. United States, 387 F.2d 307 (8th Cir. 1967), cert. denied, 390 U.S. 1044 (1968)	9-10
Hill v. United States, 346 F.2d 175 (9th Cir.), cert. denied, 382 U.S. 956 (1965)	3
Shea v. Gabriel, 520 F.2d 879 (1st Cir. 1975)	3-4
United States v. Birrell, 470 F.2d 113 (2d Cir. 1972)	7
United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973)	7
United States v. Gargotto, 476 F.2d 1009 (6th Cir. 1973)	9-10
United States v. Ryan, 402 U.S. 530 (1971)	3-4
United States v. Sclafani, 265 F.2d 708 (2d Cir.), cert. denied, 360 U.S. 918 (1959)	8

Other Authorities

New York City Charter and Administrative Code Annotated §803 (1976)	6
Rule 41(e) of the Federal Rules of Criminal Procedure	1

ARGUMENT

POINT I

THE DISTRICT COURT'S ORDER DENYING STREETWORKERS' MOTION FOR THE RETURN OF ITS BOOKS AND RECORDS IS APPEALABLE

The Government argues that because Streetworkers' motion for an order directing the return of its books and records pursuant to Federal Rule of Criminal Procedure 41(e) also sought the suppression of such books and records at any subsequent proceeding, the order of the District Court, which made no disposition of the prayer for suppression, is not appealable (Government's Brief, pp. 5-9). Both the procedural history of this proceeding and the authorities cited by the Government in its brief militate against acceptance of the Government's argument that this Court lacks jurisdiction of the instant appeal.

It is conceded that at the time Streetworkers made its Rule 41(e) motion, no criminal proceedings were pending against Streetworkers, nor had any grand jury subpoena been served upon Streetworkers demanding the production of its books and records (A-5). Although the order appealed from recited that "[t]he Government is serving a Grand Jury subpoena ..." (A-11), such subpoena had not been

served at the time the motion was decided. Indeed, the Government admits that it was subsequent to the issuance of the order appealed from that officials and employees of Streetworkers were formally served with grand jury subpoenas duces tecum demanding the production of, among other items, the documents which had originally been subpoenaed by the City of New York Department of Investigation (Government's Brief, p. 4). It is also conceded that no indictment or other formal criminal process has been issued against Streetworkers to date (Government's Brief, p. 9). Moreover, it may be that no indictment or other formal criminal process will ever be issued against Streetworkers.

In view of the foregoing, it is readily apparent that the only issue ripe for determination by the Court below, and by this Court, is whether the Government should be required to return those of Streetworkers' books and records which had been unlawfully retained by the City of New York Department of Investigation beyond the conclusion of its investigation and thereafter unlawfully transferred to and retained by the United States Attorney. The District Court made no disposition of that part of Streetworkers' motion seeking suppression of its books and records in any subsequent proceeding, apparently finding

such prayer for relief to be premature.

The Government contends that because Streetworkers' motion for an order directing the return of its books and records contained a premature prayer for suppression, the order denying the return of such books and records is not appealable (Government's Brief, p. 7). It is respectfully submitted, however, that the only issue before this Court is the propriety of the District Court's order denying the return of Streetworkers' books and records, and it is conceded by the Government that an order denying such return alone is clearly appealable (Government's Brief, p. 6).

The foregoing distinction was drawn in Hill v. United States, 346 F.2d 175, 177-78 (9th Cir.), cert. denied, 382 U.S. 956 (1965), cited by the Government at page 7 of its brief, and was further expounded upon in Shea v. Gabriel, 520 F.2d 879, 880-82 (1st Cir. 1975), cited by the Government at pages 7 and 8 of its brief. As the Court noted in Shea, if that part of the order denying the return of property were held to be nonappealable, "... the Government might indefinitely retain the property without any opportunity for the movant to assert on appeal his right to possession." Shea v. Gabriel, supra, 520

F.2d at 881, quoting United States v. Ryan, 402 U.S. 530, 533 (1971).

The Government attempts to meet this argument by stating that if Streetworkers is not indicted, its books and records would be returned "without any need for this Court to resolve the underlying issue" (Government's Brief, p. 9). However, the issue before this Court is whether Streetworkers is entitled to the return of its books and records now, and not at some indefinite time in the future when the Government, in its sole discretion, determines that it no longer has any use for them.

Moreover, the Government's attempt to render the District Court's order nonappealable by serving grand jury subpoenas duces tecum subsequent to the issuance of such order merely underscores the lack of merit in the Government's argument. Indeed, the Government has cited no authority whatsoever for the proposition that by serving a grand jury subpoena subsequent to the issuance of the order sought to be appealed from, it can retroactively create a criminal proceeding in esse and thereby render the pre-existing order nonappealable.

POINT II

THE GOVERNMENT HAS ADVANCED NO VALID REASON FOR HAVING OBTAINED STREETWORKERS' BOOKS AND RECORDS DIRECTLY FROM THE CITY OF NEW YORK DEPARTMENT OF INVESTIGATION RATHER THAN LAWFULLY SUBPOENAEING THEM FROM STREETWORKERS

The Government contends that it was entitled to obtain Streetworkers' books and records directly from the City of New York Department of Investigation notwithstanding the fact that at the time the Government obtained the documents, no criminal proceedings were pending against Streetworkers and no grand jury process had been served upon Streetworkers demanding the production of its books and records (Government's Brief, pp. 9-15). It is readily apparent, however, after reviewing the authorities cited by the Government, that the Government's contention is without merit.

The Government alleges that the transfer of Streetworkers' books and records to the United States Attorney was authorized by a provision of the New York City Charter which provides that the City of New York Department of Investigation may, upon completion of an investigation, forward a copy of its written report or statement of findings to the appropriate prosecuting

attorney (Government's Brief, pp. 10-11). The Government fails to recognize, however, that there is a significant difference between forwarding a written report or statement of findings to an appropriate prosecuting attorney and delivering the private property from which the report or statement was prepared. The limited powers conferred upon the City of New York Department of Investigation by Section 803 of the New York City Charter do not include prosecuting any criminal conduct or transferring the investigated party's property to any municipal, state or federal prosecuting agency (Streetworkers' Brief, p. 10). In retaining Streetworkers' books and records subsequent to the completion of its own investigation and thereafter transferring the documents to the United States Attorney, the City of New York Department of Investigation in effect seized the documents (Streetworkers' Brief, pp. 10-11).

The Government further contends that because cooperation between federal and state law enforcement agencies has been both sanctioned and encouraged by the courts, a municipal investigatory agency is permitted to transfer private property subpoenaed in the course of one of its investigations to a federal law enforcement agency without either notifying the target of the investi-

gation of such transfer or resorting to any formal legal process whatsoever (Government's Brief, p. 11). A review of the authorities cited by the Government, however, discloses that such authorities deal with completely different factual situations and policy considerations than those presented by the instant case.

In United States v. DeBerry, 487 F.2d 488 (2d Cir. 1973), discussed by the Government at pages 12 and 13 of its brief, this Court held that the fact that it was a sergeant from the Los Angeles Police Department who initially seized the defendant's suitcase containing marijuana, but the federal government which utilized such evidence, did not give rise to a Fourth Amendment violation. In reaching this conclusion, the Court reasoned that the cooperation between state and federal law enforcement agencies had been joint since the inception of the investigation and that "[s]uch cooperation and teamwork are a laudable and necessary adjunct to the nationwide attack against drugs ...", United States v. DeBerry, supra, 485 F.2d at 451, n. 4. In the instant case, as in United States v. Birrell, 470 F.2d 113 (2d Cir. 1972), the investigations of the municipal and federal agencies were at all times totally independent of each other. Indeed, the City

of New York Department of Investigation had retained Streetworkers' books and records for a period in excess of one year before transferring them to the United States Attorney who in turn has retained the documents for a period in excess of one year (Streetworkers' Brief, pp. 3-4). Moreover, there was no danger of the books and records disappearing before the Government could arrange for the issuance of lawful process demanding their production.

The case of United States v. Sclafani, 265 F.2d 408 (2d Cir.), cert. denied, 360 U.S. 918 (1959), discussed by the Government at pages 13 and 14 of its brief, is equally inapposite. In Sclafani, documents which had been furnished by a taxpayer to an IRS Revenue Agent for audit purposes were subsequently transferred to the IRS Intelligence Division for possible prosecutive action. The Court noted that there was inherent in any routine tax investigation a warning that the Government would pursue the evidence wherever it led, including possible criminal action, and that it need not apprise the taxpayer "as to the direction in which its necessarily fluctuating investigations lead." United States v. Sclafani, supra, 265 F.2d at 415 (Government's Brief, p. 14). In the instant case,

however, it cannot be seriously maintained that Streetworkers expected, when it surrendered its documents to the City of New York Department of Investigation, that it was producing those documents for inspection and possible prosecutive action by the United States Government.

The cases of Gullett v. United States, 387 F.2d 307 (8th Cir. 1967), cert. denied, 390 U.S. 1044 (1968), and United States v. Gargotto, 476 F.2d 1009 (6th Cir. 1973), cited by the Government at page 11 of its brief, not only do not aid the Government in its argument, but accentuate the key distinction made by Streetworkers in the instant case. In Gullett and Gargotto, the issue presented was whether one law enforcement agency, in searching for physical evidence attendant upon the commission of a crime, could transfer the evidence lawfully seized to another law enforcement agency having jurisdiction over the crime which the evidence apparently supported. The courts quite properly held in these cases that under such circumstances it would be seriously detrimental to effective law enforcement to require competing law enforcement authorities to hold a conference for purposes of deciding which agency should properly seize the evidence in question. In the instant case, however, there was no such urgency and no

such immediacy so as to require the City of New York Department of Investigation to act on behalf of the United States Government in obtaining Streetworkers' books and records and in then transferring them to the United States Attorney. The facts presented by the Gullett and Gargotto cases simply do not exist in the instant case, where the City of New York Department of Investigation retained the documents for a period in excess of one year and only transferred them to the United States Attorney at the conclusion of its own investigation.

In the instant case, there can be no dispute that effective law enforcement could not have conceivably been hampered had the City of New York Department of Investigation notified Streetworkers of its desire to turn the documents in question over to the United States Attorney and afforded Streetworkers the opportunity to demand the return of such documents. Presumably, the City of New York Department of Investigation could have simultaneously notified the United States Attorney of its intention to return the documents to Streetworkers at which time the United States Attorney could have arranged for the issuance of a lawful grand jury subpoena demanding the production of such documents.

Indeed, the Government's service of a grand jury subpoena upon Streetworkers subsequent to the issuance of the District Court's order denying Streetworkers' motion for the return of its books and records, and after a notice of appeal from that decision had been filed, clearly indicates that the Government recognizes its obligation to serve such a subpoena in order to gain lawful control of the documents. If the Government were correct in its contention that it was entitled to obtain Streetworkers' books and records directly from the City of New York Department of Investigation notwithstanding the fact that at the time the Government obtained the documents no grand jury process had been served upon Streetworkers demanding the production of its books and records, the Government's service of a grand jury subpoena subsequent to the issuance of the District Court's order would have been entirely unnecessary.

It is therefore apparent that the Government's position is without merit. The issue presented is not, as stated by the Government at page 15 of its brief, whether the Government could have lawfully secured the documents, but whether the procedure in fact utilized by the Government in this case was lawful. It is respect-

fully submitted that the Government has neither been able to refute the authorities cited in Streetworkers' principal brief, nor has it articulated any justification for its unlawful seizure of Streetworkers' books and records.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the order of the United States District Court for the Southern District of New York, denying Streetworkers' motion for the return of its books and records, be reversed.

Respectfully submitted,

DELSON & GORDON
Attorneys for Petitioner-Appellant
Streetworkers, Inc.

Martin H. Weisfuse,

Of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

ERNAN OQUENDO, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 516 UTRECHT AVE. BROOKLYN. N.Y.

That on the 1ST day of APRIL, 1977, deponent personally served the within REPLY BRIEF FOR PETITIONER-APPELLANT upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

ROBERT B. FISKE
UNITED STATES ATTORNEY FOR THE
SOUTHERN DISTRICT OF NEW YORK
ATTORNEY FOR RESPONDENT-APPELLEE
ONE ST. ANDREWS PLAZA
NEW YORK, N.Y.

Ernan Oquendo

Sworn to before me this
1st day of April 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979